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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-839

ROSEBUD WILLIAMS,

Petitioner,

versus

MISSISSIPPI EXPORT RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi was rendered and filed on June 19, 1972, and petition for rehearing denied September 12, 1972, in case of *Mississippi Export Railroad Company vs. Rosebud Williams* (No. 46690) and is reported in 266 So. 2d 28, Appendix "A".

JURISDICTION

Jurisdiction of this Court is apparently sought to be invoked under the provisions of *Title 28, U. S. C.*, Section *1257(3)*.

STATUTE INVOLVED

The Federal Statute involved is the Federal Employers' *Liability Act, Title 45, U. S. C., Section 51,* which provides, in part, as follows (Appendix "B").

> "Every common carrier by railroad while engaged in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, or roadbed, works, boats or other equipment."

QUESTION PRESENTED

Whether the Mississippi Supreme Court erred in its application of the provisions of the *Federal Employers' Liability Act (45 U. S. C., Section 51)*, and the decisions and opinions of the United States Supreme Court, in reversing judgment for Petitioner and rendering judgment for Respondent where there was no proof in the record of any negligence on part of Respondent, even the slightest, from which a jury might reasonably infer either proximately or remotely caused or contributed to Petitioner's alleged injury.

STATEMENT

Petitioner sued Respondent under Federal Employers' Liability Act for $250,000.00, in the Circuit Court of Jackson County, Mississippi, for back injuries alleged to have been received April 10, 1968, while unloading crossties from a low side gondola car, and was awarded damages by the jury in the amount of $50,000.00 on which judgment entered. Respondent appealed to the Supreme Court of Mississippi where the verdict and judgment were set aside and judgment rendered in favor of Respondent.

Petitioner charged in the declaration that Respondent was negligent in (1) using two men instead of four to unload each tie from the gondola car; (2) failure to furnish a safe place in which to work; (3) failure to properly instruct Petitioner and his co-workers and (4) permitting existence of banding straps or wire in gondola car where appellee and co-workers were unloading ties.

At the time of the alleged injury, Petitioner and his co-workers were unloading creosoted crossties which measured 6" x 8" x 8 1/2' and weighed between 160 and 165 pounds by actual weight.

Petitioner reported slipping or tripping on a tie or banding wire while unloading ties and hurt his back on April 10, 1968. Petitioner reported to Dr. R. A. Roberts, a general practitioner of medicine, on April 11, 1968, and returned to his regular duties as a section laborer on April 15, 1968, and worked regularly until

September 16, 1968, when he again claimed he injured his back stepping across a ditch going to a country store and was permitted to return to work on September 17, 1968, when he stated he was able to return to work and made no mention of any injury on April 10, 1968. His work record, in evidence, shows Petitioner worked regularly, except for vacation time and time off with sinus trouble, from March 15, 1968 to March 14, 1969, prior and subsequent to date of alleged injury. Petitioner was retired March 14, 1969, because of congenital degenerative back disease on recommendation of Dr. R. A. Roberts, M. D., Moss Point, Mississippi, who examined Petitioner on April 14, 1968. Appellee's family doctor since 1960, Dr. Sol E. Johnson, M.D., hospitalized appellee for sinus trouble, made a physical examination of Petitioner and swore Petitioner was able to return to regular duties as section laborer and that he made no mention of any disabling injury in 1968. Dr. Johnson referred appellee to Dr. Daniel J. Enger, M. D., an orthopedic specialist, Pascagoula, Mississippi, for orthopedic examination and evaluation and Dr. Enger swore that, in his opinion, based on his examination, Petitioner was able to return to regular duty; that Petitioner gave no history of a back injury in 1968, but did give a history of a back injury in 1945. Dr. O. J. Andy, a neurological surgeon and instructor at University of Mississippi Medical School in Jackson, Mississippi, testified he first saw Petitioner and examined him in October of 1969, at which time Petitioner gave a history of back injury in 1967, while lifting a wrenching machine, and no mention was made of an accident or injury on April 10, 1968, and Dr. Andy related Petitioner's condition, as testified to by Dr. Andy, to the alleged back injury of 1967.

Petitioner testified that in April 1969, a year following the alleged accident and injury for which suit was filed, Petitioner made application for Railroad Retirement Disability benefits and was approved for such benefits, because of a sinus condition and not because of an alleged disability due to a back injury.

As to the alleged accident, Petitioner testified the ties in the gondola car were banded or bundled with metal strap or wire and said (R. 251):

> "While unloading the ties — there's band strapping in the car, I don't know whether it was a piece of wire, or one of the bands — Nevertheless, the ties was piled on the other end of them, and some of them was down under my feet. And I begun to run and sheve the tie off, and it caught me, caught my left leg and throwed me down in the car against some more ties, on my left side. And Robert, being with me, caught the tie.
>
> "I couldn't tell you what position I was in, you know, when a person falls — I was trying to protect myself. I had the tie, but I didn't have time to turn it a loose before I fell."

Petitioner testified he had twenty-four years experience loading and unloading crossties (R. 252); that the ties weighed between 350 and 400 pounds each (R. 252), but Petitioner had never weighed any ties on Respondent's railroad (R. 281). Petitioner reported the accident the following day and made a report of same

and was told to go see a doctor (R. 254-255); that he reported to a doctor but did not know which doctor who prescribed double strength aspirin (R. 255-256); that he returned to work and worked "pretty regular thereafter and took vacation time when he did not feel like working" (R. 257-258). He sprained his back stepping across a ditch in September, 1968, and missed a couple of days from work but continued to work until March 14, 1969 (R. 266-267).

Petitioner injured his back in 1945 while working for the GM&O Railroad Company and told Dr. Enger about the 1945 accident (R. 279-280).

Petitioner testified to unload the ties, one man would put the tie on the side of the gondola and the other man would shove it across the edge of the gondola where it dropped to the ground (R. 286); that the ties in the gondola had been banded (R. 292); that he did not remember who cut the bands, but the bands were cut when he got into the gondola (R. 292-293); that the ties were 6" x 8", 7" x 8" and were 8 1/2 feet long (R. 294); that about April, 1969, Petitioner started drawing Railroad Retirement Disability benefits in the amount of $154.00 every two weeks for sickness due to sinus trouble (R. 301-305).

Petitioner was sent to see Dr. Daniel J. Enger for examination and evaluation by Dr. Sol E. Johnson, who was treating Petitioner at the time for sinus trouble (R. 307-308). Petitioner lost from 33 to 34 days from work because of sinus trouble (R. 309).

Petitioner testified that on September 16, 1968, going to a country store near the railroad, he jumped a ditch and hurt his back and gave a statement that Petitioner was feeling fine and able to return to his regular work (R. 315-317) and that on September 16, 1968, when he jumped the ditch he rehurt his back in the same place where it had been hurt before (R. 321-322).

Dr. O. J. Andy testified that he was a neurosurgeon from Jackson, Mississippi, and first saw Petitioner in 1969, at which time Petitioner gave a history of low back pain since 1967, when Petitioner sustained an injury while working for MERR "lifting a wrench machine" and felt something pull in his low back; that it made appellee sick; that he went blind momentarily (R. 325-326).

Petitioner was X-rayed by Dr. Andy on October 28, 1969, and myelographic X-rays made in March of 1970. Dr. Andy saw Petitioner at fairly regular intervals. Petitioner had recurring episodes of pain in his low back, whenever he tried to exert himself like lifting logs off a truck. In one instance, according to Dr. Andy, Petitioner had unloaded a ton or two of logs and when he got on the third one he had to quit because of the pain that developed in his low back (R. 334-335).

Petitioner was operated on by Dr. Andy on March 19, 1970, (R. 339). He testified "A. I felt that he was 100 percent permanently disabled, in relation to performing heavy labor, and he was 5 per cent permanent partial disability to his body as a whole" (R. 340-341). He was not sure which accident he was testifying about

(R. 351). He related the condition he testified to to an alleged accident in 1967 and not 1968 (R. 359-360).

Robert James Smith, a co-worker of Petitioners, testified he worked with Petitioner on April 10, 1968 (R. 374-375); that Petitioner trained the witness as a section hand (R. 380); that the witness and Petitioner broke the straps binding the crossties before they started unloading the ties from the gondola car and that Petitioner used a maul to break the straps binding the crossties (R. 381).

The witness, Smith, testified that two men were working on each end of the gondola car unloading ties; that one man would put the tie on the edge or side of the gondola and the other would shove it over where it fell to the ground (R. 382-383); that the ties were being unloaded in the usual and customary manner; that he had never known of Mr. Carpenter or any of the section crews using four men to a tie; that when he started working for MERR they used two men to a tie and that if Mr. Carpenter used four men to a tie, the tie would have to be a "switch" tie "which is a great long one" and you can't put a switch tie crossways in a gondola car (R. 383-384); that the full weight of the tie is never on one man when unloading ties; that two men can safely handle one of the ties being unloaded at the time and that two men are all that are necessary to do that type work with reasonable safety (R. 384-385); that following the date of the alleged accident the witness and Petitioner had unloaded other cars loaded with ties; that in September 1968, Petitioner jumped a ditch and claimed he hurt his back at that time (R. 386-387).

Smith testified that he had weighed ties of the same kind, quality and type as the ties being unloaded from the gondola, on the date of the alleged injury, but did not know how much the ties weighed and that his earlier testimony as to the weight of the ties were mere guesses (R. 388-389).

Smith was later recalled to the stand and testified that since giving the earlier testimony he had weighed crossties of the same size, character and creosoted, like the ties being unloaded by Petitioner on April 10, 1968, and the ties weighed 160 pounds (R. 466) and that two men could handle the ties with reasonable safety (R. 467-468).

Leroy McMillan testified that he was working on the south end of the gondola car unloading ties with a co-worker and that Robert Smith and Petitioner were on the north end of the car; that during the lunch hour Petitioner complained that his back was hurting; that Petitioner continued to unload ties for the remainder of the day (R. 400-406); that the ties were being unloaded in the usual and customary manner and that two men to a tie had been used to unload ties over the past twenty-four years and that it was a safe and reasonable way to unload ties (R. 407). He did not know the weight of the ties and that when he spoke of the weight of the ties, it was an estimate or guess on his part (R. 409).

After being excused from the stand, Respondent later recalled Leroy McMillan to the stand and he testified that he had testified earlier that the ties being

unloaded weighed from 350 to 400 pounds each and that since his testimony he had weighed crossties of the same kind, quality and type as those being unloaded from the gondola car and that the ties weighed from 160 to 165 pounds (R. 459-462).

Dr. Daniel J. Enger, an orthopedic surgeon of Pascagoula, Mississippi, testified that he examined Petitioner April 23, 1969, at the request of Dr. Sol Johnson, a local physician (R. 411-413).

Dr. Enger testified Petitioner gave a history of having been struck in the back by a crosstie in 1945 and that Petitioner's last day of gainful employment was March 14, 1969, when Petitioner ceased work because of sinus trouble for which he was hospitalized, under the care of Dr. Johnson and it was Dr. Enger's opinion, based on his examination of Petitioner, that as of April 23rd, 1969, Petitioner could return to work (R. 413).

Dr. Paul H. Moore, Pascagoula, Mississippi, a medical doctor specializing in radiology, examined the X-rays taken of Petitioner and his examination showed "spurring" and at C-5 and C-6, "disease of the vertebrae as well as degenerative disease of the intervertebral discs, aging process." (R. 446). Petitioner, according to Dr. Moore, also had degenerative disease of the lumbar vertebrae, a degeneration of L-5 and S-1 (R. 447).

Dr. Sol E. Johnson, a medical doctor of Moss Point, Mississippi, and Petitioner's family doctor, first saw Petitioner in 1960 and had never treated Petitioner for a back injury or ailment but had treated Petitioner

for sinusitis and bronchitis (R. 452-453); that in Dr. Johnson's opinion Petitioner could return to work when he was released from the hospital where he was confined with a sinus condition (R. 452-454); that Doctor Johnson had Dr. Enger examine Petitioner because Petitioner had told Dr. Johnson the Respondent would not permit Petitioner to return to work and appellee was being retired and that Dr. Johnson and Dr. Enger were both of the opinion Petitioner was able to return to work and that Petitioner was in good physical shape for a man of his age and occupation (R. 454-455). Dr. Johnson certified Petitioner as able to return to work on April 15, 1969 (R. 456).

W. O. Carpenter, section foreman on April 10, 1968, with forty years of experience as a section foreman (R. 471), testified that nothing unusual happened on April 10, 1968, so far as he knew; that on April 11, 1968, he learned that Petitioner claimed to have tripped on a crosstie on the 10th of April and made a record of it in his time book (R. 471-472); that there were 383 ties in the gondola car being unloaded on the 10th of April, 1968, and the dimensions of the ties were 6" x 8" x 8 1/2' and creosoted (R. 473); that the ties weighed 160 pounds each and two men could handle the ties with reasonable safety (R. 474); that wire bands are used to fasten the ties together when they are creosoted and loaded into a gondola car; that it is the job of the men on the section crew to cut the bands holding the ties together and that the crew have tools to cut the bands (R. 477).

C. A. Stephenson, Chief Engineer of MERR, testified the section foreman, Carpenter, reported that Petitioner claimed he was injured on April 10, 1968 (R. 481); that the witness questioned Petitioner and was told that Petitioner slipped on a tie and sprained his back; that Petitioner was sent to see Dr. Roberts and that Petitioner did not lose any time from work, other than as shown or indicated on the time records and worked at his regular job without complaint (R. 482-483); that Petitioner reported he hurt his back jumping a ditch following the April 10th, 1968, claim and that Petitioner gave him a statement in which Petitioner stated he was feeling all right and could return to his regular job (R. 483). Petitioner was sent to a doctor for examination who reported that because of Petitioner's condition he should be retired (R. 483-484).

C. A. Stephenson further testified that before his employment by MERR he had had twenty years experience with ties and equipment and the ties being unloaded on April 10, 1968, weighed about 164 and 165 pounds each (R. 485); that he had some of the ties weighed of the same type, quality and size as those in the gondola car on April 10, 1968; that six of the ties were weighed and were six by eights and that two men to a tie were sufficient to unload ties with reasonable safety and that this was customary in the industry (R. 486-490).

Dr. R. A. Roberts, Moss Point, Mississippi, a general practitioner, with twenty-one years experience, testified he examined Petitioner on April 11, 1968; that Petitioner had a marked lumbosacral sprain and was given

medication (R. 492); that Petitioner was examined again on June 20, 1968, and cleared for work; that Petitioner was again seen in September, 1968, complaining of a catch in the left flank caused by "stepping across a ditch"; that X-rays showed a degenerative disease of cervical vertebrae C-6 and C-7, as well as degenerative disease of "lumbar vertebral bodies, discs, narrowing at L-5 and S-1 level, the fifth lumbar and first sacral level" (R. 493). He testified that he examined Petitioner on April 14, 1969, and, because of the degenerative diseased bodies of the cervical and lumbar spine, recommended Petitioner be retired (R. 496). He further testified that Petitioner gave him a history of having suffered back injury in 1945 while unloading crossties (R. 497).

REASONS FOR DENYING THE WRIT

The decision of the Supreme Court of Mississippi, in reversing the judgment for Petitioner and rendering judgment for Respondent, is not at variance with the Federal Employers' Liability Act or any of the decisions of this Court.

Petitioner's allegation of injury on the job is not proof of negligence on the part of Respondent under the Federal Employers' Liability Act and decisions of this Court.

Guesses, suppositions and opinions as to the weight of a crosstie must give way to the uncontradicted testimony as to actual weight of the crosstie as shown by the scales.

As stated in the opinion (Appendix A), "Neither the weight of the crosstie nor the number of workmen handling it had anything whatsoever to do with plaintiff tripping over a banding wire that he had carelessly left on the floor of the gondola car."

Petitioner's major contention is that the Supreme Court of Mississippi went beyond or failed to apply the rules of this Court laid down in *Rogers v. Missouri-Pacific Railway Company*, (1957) 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, which case is cited in the opinion of the Supreme Court of Mississippi and which sets forth the test of a jury case under the *Federal Employers' Liability Act*, as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.
>
> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal

> and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

In the case of *Tiller v. Atlantic Coast Line Railroad Company*, (1943) 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967, holding (among other things) that "the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances, or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances or situation, or doing what such a person under the existing circumstances would not have done.", this Court recognized that some negligence, even the slighest, on the part of the employer must be proved or shown to have caused or contributed to the injury for which damages are sought. This rule was also recognized by the Supreme Court of Mississippi in arriving at its decision.

Petitioner cites the case of *Tennant v. Peoria & P. U. R. Co.* (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, recognizing the holdings in the earlier cases and the tests to be applied in jury cases, and in which it is said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon

petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. * * *.

"Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do the duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' * * *."

In *Lavender vs. Kurn* (1946), 327 U. S. 645, 652, 66 S. Ct. 740, 90 L. Ed. 916, this Court, with reference to the facts reflected by the record before it, among other things stated: "* * *. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. * * * ." There can be no question that this is a true statement of the law, but where the evidence is not conflicting and there is no issue to submit to the jury then the trial judge should direct the verdict accordingly.

Petitioner next cites the case of *Bailey v. Central Vermont Railway Company* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. This case does not change the test as applied by the Supreme Court of Mississippi using the decisions of this Court as a guide.

The rule is not changed by the case of *Wilkerson vs. McCarthy* (1949), 336 U. S. 53, 69 S. Ct. 744, 93 L. Ed. 497 and in this case the Court said (336 U. S. 53, 55), among other things, that "• • • . This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. • • •."

In the case of *Rodericker v. Illinois Central Railroad Company* (1971), 400 U.S. 1012, 91 S.Ct. 565, 27 L.Ed. 2d 626, appealed from the Supreme Court of Mississippi, this Court denied the petition for writ of certiorari, but the dissenting opinion of Justice Black does no harm to the test or rule to be applied in Federal Employers' Liability Act cases. In the Rodericker Case the injured employee sued the wrong defendant and in *Rodericker v. Illinois Central Railroad Company*, (1970) 236 So.2d 414, 420, the Mississippi Supreme Court said:

> "Upon the undisputed evidence in the record reasonable men could not differ in concluding that at the time of his injury, Rodicker was the servant of UPT, doing its work, and under its exclusive supervision, direction and control. The trial court correctly found that there was no factual issue as to this and no evidence capable of supporting a jury finding that, at the time of his injury, Rodicker was working as a servant of Illinois Central or under its supervision, direction or control, and his action in directing a verdict for appellee was correct."

The rules laid down by Congress in the Act and the decisions of this Court regarding the application of those rules and tests to be applied in each case have not been changed in the cases of *Schultz v. Pennsylvania R. Co.* (1956), 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668; *Stone v. New York C & St. L. R. Co.*, (1953) 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441; *Carter v. Atlanta & St. A. B. R. Co.*, (1949) 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236; *Wilkerson v. McCarthy* (1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Anderson v. Atchison, T. & S. F. R. Co.* (1948), 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108; *Lillie v. Thompson* (1947), 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 and *Myers v. Reading Co.*, (1947) 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615. All of these cases provide that under the Act recovery for personal injuries and death must rest on a showing of some negligence supported by probative facts capable of supporting, with reason, the conclusion expressed in the verdict and where there is no showing of negligence, even the slightest, then the case is not one for the jury.

The cases cited by Petitioner furnish no basis for Petitioner's claim that the decision of the Supreme Court of Mississippi is in conflict with the Act or decisions of this Court.

The books are dotted with cases of this Court which hold that before a case is submitted to the jury there must be probative facts capable of supporting, with reason, a jury verdict.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney For Respondent.

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Respondent, Mississippi Export Railroad Company, hereby certify that I have this day mailed, postage prepaid, United States Mail, two copies of the foregoing brief for the Respondent in opposition to petition for writ of certiorari to Messrs. Ramsey, Bodron & Thames, Attention Honorable James B. Ramsey, First National Bank Building, Vicksburg, Mississippi 39180, and one copy to Honorable Donald Cumbest, 707 Watts Avenue, Pascagoula, Mississippi, 39452, attorneys of record for Petitioner, Rosebud Williams.

This the ____ day of January, 1973.

Williams S. Murphy
Post Office Box 585
Lucedale, Mississippi 39452

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,690

ROSEBUD WILLIAMS

versus

MISSISSIPPI EXPORT RAILROAD
(266 So. 2d 28)

ROBERTSON, JUSTICE:

Rosebud Williams, a male, sued the Mississippi Export Railroad Company in the Circuit Court of Jackson County under the Federal Employes' Liability Act for injuries sustained by him on April 10, 1968, when he tripped over a banding wire while unloading railroad crossties from a gondola car. The jury returned a verdict for $50,000.00 and the Railroad Company appeals.

Plaintiff testified that he began work for defendant as a section laborer on December 16, 1952; that he had been working for defendant about 16-1/2 years when he was retired because of sinus trouble and a degenerative back condition. Prior to working for defendant he had worked as a section laborer for the Columbus-Greenville Railroad Company, Gulf, Mobile and Ohio Railroad Company and Southern Pacific Railroad Company.

One of his regular duties was unloading crossties. On April 10, 1968, along with 4 other section crewmen, he began to unload regular creosoted crossties from

a low-side gondola car, which is an open car with side about four feet high. There were 383 crossties in this gondola car. They were bound together in lots of twelve with metal bands or wires, and it was the duty of the crewmen unloading them to cut these metal bands so that the crossties could be unloaded one by one.

Robert Smith and plaintiff were working as a team in the north end of the gondola car, and Leroy McMillian and Chambers White were working in the south end. Rosebud testified that he and Smith had a cleaver and a maul with which to cut the banding wires. Smith testified that he held the cleaver while Rosebud wielded the maul in cutting the metal bands binding the crossties. The procedure for unloading was for Smith to pick up one end of the 160-pound crosstie and place it on the side of the gondola car. Rosebud would pick up the other end and slide it over the side of the railroad car.

Rosebud testified:

> "While unloading the ties — there's band strapping in the car, I don't know whether it was a piece of wire, or one of the bands — Nevertheless, the ties was piled on the other end of them, and some of them was down under my feet. And I begun to run and sheve (sic) the ties off, and it caught me, caught my left leg and throwed me down in the car against some more ties, on my left side. And Robert, being with me, caught the tie."

Plaintiff complained to his fellow workers that he had hurt his back but he continued to work for the

rest of the day. On the morning of April 11, he reported to his section foreman, W. O. Carpenter, that he had injured his back. Carpenter sent him to Thompson's Clinic at Moss Point, where he was examined by Dr. Forrester. T. M. Von Sprecken, Jr., Vice-President and General Manager of Defendant, was called as an adverse witness by plaintiff and testified that the report from Thompson's Clinic was: "Sacro-sprain, and okay to go back to work on Monday, the 15th."

On April 15th, Rosebud returned to his regular job and worked in the same manner that he had in prior years.

He testified that he again injured his back in the same place about September 18, 1968, when in going to a grocery store near his place of work he jumped a ditch and twisted his back. He was 59 years of age at this time and had been working as a section hand for 24 years. On September 20th, he was sent to the hospital for X-rays.

Dr. Roberts of Thompson's Clinic testified:

> "Yes, the X-ray report says cervical spine shows degenerative disease, cervical vertebral body degenerated, C-6 and -7, cervical 6 and 7; lumbar spine showed degenerative disease, lumbar vertebral bodies, discs, narrowing at L-5 and S-1 level, the fifth lumbar and the first sacral level.
>
> "Q All right, sir. Now, that's degenerative disc disease that your talking about?
>
> "A Yes, sir.

"Q Then, Doctor, when was he returned to work; does your record sho[w] that is as a result of —

"A The September episode.

"He was seen again by Dr. Thompson on the 2nd of October. And the entry here says 'X rays, change consistent with degenerative disease,' aging. Able to return to work October 2nd."

Dr. Roberts further testified, without objection, as to an October 11, 1968, written report to Von Sprecken:

"This was written by Dr. Thompson. He had seen him at the time he was in the hospital and had his X rays made. The patient, in my opinion, has only an involvement in keeping with his age. However, in his type of work, it would be continuously bad on this condition. If he were being hired to new employment, it would probably be the same type of work. It's my opinion that this man can continue to work on his present job, keeping in mind that at an early time the degenerative process will proceed at a normal rate."

Dr. Roberts made another written report on April 16, 1969. He stated from the witness stand:

"Let's see. The above patient was examined by me on April 14, '69. After examining this patient and reviewing the X rays, I note the degenerative diseased bodies, and degenerative discs C-6 and -7 level, which means de-

generated cervical and lumbosacral spine, minimal narrowing at the L-5 and S-1 level, due to the type of disease of the cervical spine. It is my opinion he should be retired."

Plaintiff testified that he made a claim for Railroad Retirement Disability Benefits in April, 1969, and that he sent in Dr. Roberts' statement in support of his claim.

He was cross-examined about this:

"Q Well, his is the one that started the benefits, isn't it, the statement that he prepared and you sent into the Railroad Retirement Board?

"A He wasn't the one that started the benefits, 'cause when I started drawing it, I got off sick for something else.

"Q What were you sick with?

"A Something like the flu. In other words, it was sinus trouble.

"Q It was sinus trouble that you had?

"A That's right; and I started drawing from there.

"Q So, that is what you started the benefits on, was your sinus trouble?

"A Right."

Rosebud testified that his retirement pay was $154.00 every two weeks.

Plaintiff filed suit on June 24, 1970. In his declaration he alleged:

"Plaintiff would further show that while attempting to unload the ties at the instruction and direction of the said W. O. Carpenter with inadequate and insufficient help, he was caused to severely, painfully and permanently injure his low back when he tripped over a banding wire while lifting one of the ties, causing him to fall on other ties in the car, severely, painfully and permanently injuring his low back."

Plaintiff charged the railroad company with negligence and carelessness "in failing and neglecting to furnish the Plaintiff with an adequate and sufficient number of co-workers to perform the work, and further by reason of the negligence and carelessness of the Defendant through its Section Foreman, W. O. Carpenter, in directing and instructing the Plaintiff and his co-workers to handle the work of unloading the crossties in an unsafe method or manner by directing that only two workers handle each tie when the said agent and employee of the Defendant knew, or through the exercise of reasonable care (should have known that this was) an insufficient number of employees to safely handle the said crossties, and by the further negligence and carelessness on the part of the Defendant in failing to exercise reasonable care to furnish the Plaintiff with a safe place to work by suffering, allowing and permitting the maintenance and existence of the loose steel tie bands in the gondola car where the Plaintiff was required to work, . . .

According to the Plaintiff, each crosstie weighed 350 to 400 pounds. Plaintiff was asked by his counsel:

"What's the normal number of men to be used in handling crossties *of this weight?*" (Emphasis added.)

To which plaintif responded:

"To do it safely, four men."

W. O. Carpenter, the section foreman, testified that these crossties weighed 160 pounds each, and later Robert Smith and Leroy McMillian testified that they actually witnessed the weighing of these regular crossties and they weighed 160 pounds each.

As to the usual and customary manner in which regular crossties were unloaded, Smith testified:

"Q Was that the usual and customary manner in which you unloaded ties?

"A Yes, sir, the only way you unloaded 'em.

"Q So, have you ever known of Mr. Carpenter, or any of the section crew, to use four men?

"A *No, sir. When I started in, all we used was two.*

"Q *That's all you ever used, isn't it?*

"A *Yes, sir. If Mr. Carpenter used four men, it would have to be a switch tie, which is a great long one.*

"Q And you can't put one of those sideways in a gondola like the one you were unloading"?

"A No, sir."

(Emphasis added)

Smith further testified as to his work with Plaintiff:

"Q How was the work divided up? Tell the Court and Jury what you all do, Robert, and how it happened.

"A We was unloading some crossties. He was tailing; I was putting 'em up, and he had to push 'em out. And he tripped over a bail wire."

"Q Now, Robert, on the date that you were there, and you were unloading these ties, were they strapped?

"A Yes, sir.

"Q The ties were strapped when you got there?

"A Yes, sir.

"Q Who broke the straps on those ties?

"A Me and him.

"Q How did you break the straps?

"A Took a maul, laid it down, and beat it up against there to break it.

"Q Did he do the beating, or did you?

"A He did the beating."

The United States Supreme Court in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967 (1943), outlined the standard to be used in FELA cases:

"In this situation the employer's liability is to be determined *under the general rule which defines negligence as the lack of due care under the circumstances;* or the failure to do

what a reasonable and prudent men would ordinarily have done under the circumstances of the situation; or doing what such a person a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment; *'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as reasonable men ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business."* (Emphasis added.) 318 U.S. at 67, 63 S.Ct. at 451, 87 L.Ed. at 617, 143 A. L. R. at 974.

(1) In Rogers vs. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), the United States Supreme Court said only slight negligence on the part of the defendant need be proved. But even that degree of negligence must be proved by a preponderance of the evidence. This the plaintiff failed to do. Plaintiff did not prove that defendant was guilty of any negligence whatsoever.

(2) The evidence was uncontradicted that plaintiff was an experienced railroad section hand; in fact, he himself testified that he had 24 years experience in this work. The proof was undisputed that new creosoted crossties came banded together with metal bands or wire. The crew members were solely responsible for cutting these metal bands and getting them out of the way. Plaintiff claimed that he was injured when he tripped over a cut banding wire. Robert Smith, plaintiff's working companion, testified that plaintiff

actually wielded the maul that broke the banding wire. Plaintiff cannot recover from his employer for injures caused solely by his own negligence. It was his duty, and his alone, to cut and remove the banding wire. This he failed to do. It was his negligence that caused his injuries. Neither the weight of the crosstie nor the number of workmen handling it had anything whatsoever to do with the plaintiff tripping over a banding wire that he had carelessly left on the floor of the gondola car.

Even under the stringent rules of FELA, the defendant was entitled to a peremptory instruction. There was no proof whatsoever that the defendant was guilty of even the slightest degree of negligence.

The judgment is, therefore, reversed and judgment rendered for the defendant.

Reversed and rendered.

GILLESPIE, C. J., and JONES, INZER and SUGG, J.J., concur.

APPENDIX "B"

TITLE 45, U. S. C., SECTION 51

"SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence — Definition of employees. —

"Every Common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats wharves or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way direct-

ly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended.